No. 14704

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,
Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue Service,
Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court for the Southern District of California, Southern Division.

SAN DIEGO OFFSET PRINTERS — 133 F ST., SAN DIEGO — BE-2-1528

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STATEMENT OF JURISDICTION OF THE COURT

This action arose in the United States District Court for the Southern District of California, Southern Division, under the jurisdiction granted by Section 7604 of the Internal Revenue Code of 1954; that section gives jurisdiction to the District Court to enforce summons issued by agents of the Internal Revenue Service under Section 7602 of the Internal Revenue Code of 1954. Pursuant to the above sections Appellee issued summons directing Appellant to appear before him with certain records, to testify as to tax liabilities of Clifford O. Boren and Delta M. Boren. (Tr. of Rec. p. 7)

Appellant, claiming certain constitutional privileges, refused to disclose the contents of such records. Whereupon Appellee petitioned the District Court for Order of Attachment of person for civil contempt. (Tr. of Rec. p. 3). After hearing on said

petition the District Court found Appellant in contempt and required the disclosure of the contents of such records. The District Court, the Honorable Pearson M. Hall, Judge presiding, filed its Memorandum of Opinion February 17, 1955, and signed Findings of Fact, Conclusions of Law and Order February 17, 1955, the same being docketed and entered February 23, 1955. (Tr. of Rec. p. 70). The order is final and appealable. (*Chapman vs. Goodman,* U.S. Court of Appeals, 9th Circuit, No. 13904, February 11, 1955).

Appellant filed Notice of Appeal on February 24, 1955. (Tr. of Rec. p. 78). Appellant filed an Appeal Bond in the sum of $300.00 and a Designation of Record of Appeal. Reporter's Transcript of Proceedings were filed March 24, 1955. The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on March 30, 1955. Appellant filed Statement of Points on Appeal in the United States Court of Appeals for the Ninth Circuit on April 8, 1955. (Tr. of Rec. p. 94).

STATEMENT OF FACTS

Appellant is the surviving spouse of E. J. Hubner, who died on January 12, 1954. E. J. Hubner was the President of the Hubner Building Company, San Diego, California. The Hubner Building Company was a corporation from February 14, 1950, to September 30, 1950. Thereafter the Hubner Building Co. was dissolved as a corporation and con-

tinued in business as a partnership until its dissolution on June 6, 1951. The affairs of the partnership were wound up on February 28, 1953. E. J. Hubner was a stockholder in the corporation and a general partner of the partnership.

On August 1, 1951, prior to the marriage of the Hubners, E. J. Hubner transferred to Appellant certain real property in San Diego County known as Big Oak Ranch of an approximate value of $100,000.00. The transfer was made to Appellant in her maiden name as her sole and separate property. (Tr. of Rec. p. 15, 50).

E. J. Hubner and Appellant married on May 23, 1952, and filed joint federal income tax returns as husband and wife for the year ending December 31, 1952. (Tr. of Rec. p. 15 & 73). Because the fiscal year of the partnership did not coincide with the taxable calendar year of E. J. Hubner and his wife, Appellant, their first joint tax return reported income from the partnership, reflected by the partnership activities and records, from March 1, 1951, through February 28, 1952. (Tr. of Rec. p. 15).

The Bureau of Internal Revenue examined the books and records of the Hubner Building Company after the dissolution of the corporation and adjusted the corporate income tax return. (Tr. of Rec. p. 13 & 73). Thereafter the Bureau of Internal Revenue examined the records of the partnership and the records of E. J. Hubner with particular reference to the taxable years of the partnership ending February 28, 1951, and February 29, 1952, and the co-

ordinate individual returns of E. J. Hubner for the taxable year ending December 31, 1951, and the individual return of Appellant and E. J. Hubner for the taxable year ending December 31, 1952. Such examinations resulted in adjustments for both years. (Tr. of Rec. p. 18 et seq. & p. 73).

During the conduct of these investigations of the Hubner Building Company and of Appellant and E. J. Hubner, the Bureau of Internal Revenue was at the same time investigating the income tax liabilities of the Clifford O. Boren Contracting Co., Inc. and Clifford O. Boren and Delta M. Boren individually.

During these investigations the Bureau of Internal Revenue extracted numerous documents, including checks and invoices, from the records of the Hubner Building Company for the purpose of photostating them. These documents were later returned to the Hubner Building Company files. (Tr. of Rec. p. 14).

After the examinations and investigations outlined hereinabove were completed, two agents of the Bureau of Internal Revenue made statements that there were indications of fraud in the transactions between E. J. Hubner, the Hubner Building Company and the Boren interests. (Tr. of Rec. p. 18, 54).

The Appellant now has in her possession and claims an interest in certain books, records, papers, paychecks, invoices, correspondence and miscellaneous data and memoranda falling within the def-

inition of papers requested by the Bureau of Internal Revenue in the summons which is the subject of this action. Said books and records relate to income received by E. J. Hubner during the years 1951 and 1952, as reported on the joint tax return of respondent and E. J. Hubner for the taxable year ending December 31, 1952. (Tr. of Rec. p. 15, 16).

Without written notice by the Bureau of the necessity of a re-examination of the records in issue, (Tr. of Rec. p. 31, 67), a summons was issued by Lloyd M. Tucker, Special Agent of the Internal Revenue Service, and served by him on Appellant, Evelyn Hubner, on November 5, 1954. The Government through Appellee was and is purporting to investigate certain transactions between the Borens and Hubner Building Company by virtue of which the Borens received in excess of $40,000.00 in taxable income not included in their returns. (Tr. of Rec. p. 36, 47, 48). The summons required Appellant to appear before Special Agent Tucker to give testimony concerning the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952. The summons also required Appellant to bring with her and produce for examination the books of account of the partnership and corporation known as the Hubner Building Company relating to transactions had by the Hubner Building Company with the Borens for the years 1950, 1951 and 1952, "together with paid checks, invoices, correspondence and any and all miscellaneous records, data and memoranda relating to transactions be-

tween the Hubner Building Company and" the Borens. (Tr. of Rec. p. 7).

Appellant appeared before Special Agent Tucker on November 29, 1954, as required by said summons, but did not produce the books and records requested by said summons on the grounds that the summons was defective and that the production of such records would tend to incriminate her within the meaning of the Fifth Amendment to the Constitution of the United States. This action followed.

THE ISSUES

Our argument is directed to the following issues:

1. Whether the Court erred in holding that Appellee was entitled to re-examine books and records in the possession of Appellant without having complied with the requirements of Section 7605(b) of the 1954 Internal Revenue Code.

2. Whether the court erred in holding that no unlawful search and seizure would occur if Appellant is required to deliver her books and records without the Government having complied with the provisions of Section 7605(b) of the 1954 Internal Revenue Code.

3. Whether the court erred in holding that the Appellant could not claim the privilege of the Fifth Amendment in refusing to produce the books and records set forth in the summons.

ARGUMENT

POINT 1

APPELLANT'S BOOKS AND RECORDS MAY NOT BE EXAMINED BY THE BUREAU UNLESS THE BUREAU HAS COMPLIED WITH THE PREREQUISITE MANDATES OF SECTION 7605(b) OF THE 1954 INTERNAL REVENUE CODE. SECTION 7605(b) PLACES A LIMITATION ON THE POWER OF THE BUREAU. IT IS NOT A PERSONAL RIGHT AVAILABLE ONLY TO THE TAXPAYER UNDER INVESTIGATION.

Appellant's contention here involves an interpretation of the word "taxpayer" used in Section 7605(b) of the 1954 Internal Revenue Code, 26 U.S.C.A. 7605(b) (formerly 26 U.S.C.A. 3631), which reads as follows:

"(b) Restrictions on examination of taxpayer — No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

The Ninth Circuit Court, in *Martin v. Chandis Securities Co.,* 128 Fed. 2d 731, said (at 128 Fed. 2d 735) as to the limitation imposed by Section 7605(b) (then Section 3631):

"The question is whether in investigating the return of one taxpayer, the Bureau may in-

> vestigate the books of a third person regardless of whether the investigation is necessary or not. In other words, is Section 3631 a limitation on the power of the Bureau, or is it merely a personal right available only to the taxpayer? "We believe it is the former and that the Bureau has no power to make an unnecessary examination or investigation."

Under the terms of the statute the taxpayer is accorded two protections against inquisitorial examinations. First, it must be shown that the examination is necessary and, second, the Bureau must give the taxpayer written notice of a proposed re-examination. In the Chandis case the court was confronted with the first situation wherein the Bureau had not shown the requisite necessity for examination. This appeal is also concerned with the second situation, namely, whether the right of re-examination of a taxpayer's books by the Bureau must be preceded in all circumstances by a written notice. The Hon. Pearson M. Hall, in his memorandum opinion, attempted a distinction as follows: (Tr. of Rec. p. 66)

> ". . . All that the Ninth Circuit held was that where the statute of limitations on the face of the record had expired against the taxpayer under investigation, an examination of the third person's books was not necessary. The examination was prohibited solely on that ground and not because there had been a prior examination."

And, further, at page 67 on the record, Judge Hall ruled that:

> "The procedural requirement that a second or additional examination of a taxpayer's books can be made only at the taxpayer's request or on written notification of the secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens)."

This court has defined the word "taxpayer" in the first phrase of Section 7605(b) to include a third person whose tax is not in question. The opinion of Judge Hall defines the same word "taxpayer", appearing in the second phrase of the same sentence, to mean only the person whose tax liability is directly in question.

We do not believe that Congress intended the first phrase of the Code section to be a limitation on the power of the bureau and the second phrase of the same sentence of the same section to constitute nothing but a right personal to a taxpayer whose tax liability may be under *formal* investigation.

We believe such a distinction to be unwarranted in the language of the statute and in the face of the general rule enunciated by this court in the Chandis case. This view of the Chandis case was adopted by the United States District Court, Western District of Kentucky, on March 24, 1955, when in the case of *In the Matter of Clarence Wood and Mary L. Wood,*

(U.S. District Court, WD of Ky., No. 2710, March 24, 1955) that court, by way of dictum, said:

> "The defendants argue that the Peoples' Deposit Bank and Trust Company case, supra, is not controlling here because the records sought by the Bureau there were not the records of the bank from whom they were subpoenaed, but belonged to individuals who were not parties to the action. We adopt the view of the Court of Appeals of the Ninth Circuit in this regard in holding the real ownership of the documents sought does not determine the stautory authority or lack of authority residing in the Bureau, but that whatever limitations upon the Bureau's power have been placed in the statute apply to all persons thus subpoenaed."

POINT 2

AN UNLAWFUL SEARCH AND SEIZURE WOULD OCCUR IF APPELLANT WERE REQUIRED TO DELIVER HER BOOKS AND RECORDS WITHOUT THE GOVERNMENT HAVING COMPLIED WITH THE PROVISIONS OF SECTION 7605(b).

Any contention that the summons itself was a substitute for the notice required by Section 7605 (b) would be unsound. The Internal Revenue Code specifically outlines the authority of the Bureau to proceed by way of summons (Sections 7602 & 7605 (a), 1954 Internal Revenue Code) and the provisions of Section 7605(b) are recognized as additional provisions for and limitations on the right of

the Bureau to act in any manner. (Martin vs. Chandis Securities Co., supra). The requirement in 7605(b) that the Bureau notify "the taxpayer in writing that an additional inspection is necessary" would have named a summons as such a notice in writing had Congress meant so to do.

The requirement of Section 7605(b) of a notice in writing of necessity for an additional inspection must be interpreted in context with the limitations of the Fourth Amendment upon search and seizure, or the Government could altogether ignore constitutional protections by the act of mailing a naked notice containing none of the reasonable specifications and designations required by the Fourth Amendment.

Hale vs. Hinkle,
201 U. S. H3; 26 S. Ct. 370; 50 L. Ed. 652.

Brown vs. U. S.;
267 U. S. 134; 48 S. Ct. 288; 72 L. Ed. 500.

U. S. vs. Medical Society,
26 Fed. Supp. 55 at 57.

The Fourth Amendment to the Constitution of the U. S. reads as follows:

"The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Government's approach in the instant case has revealed that the fraud which it wishes to prove involves a total sum in excess of approximately $40,000.00. The Government must have arrived at this conclusion from its previous examination of the Books and Records in Appellant's possession. It must have had specific transactions in mind, whether one or many, and specific times and persons and places. Having once examined the books and records with some detail, including the making of photostatic copies, the Government is here in a peculiarly apt position to satisfy the public need for investigation while still satisfying the statutory and constitutional right of the individual to be free from a "fishing expedition" into his private papers.

Appellee has neither complied with the plain language of Section 7605(b) as to the giving of a notice in writing, nor the constitutional protections of the Fourth Amendment inherent in that Section: limitations of "Necessity" on any examination or investigation by the Government. It can hardly be "necessary" for the Government to wander loosely and generally through Appellant's private papers in order to obtain the books, records, papers, checks, invoices, data, and memoranda relating to specific transactions which already are known with particularity to the Government.

POINT THREE

THE COURT ERRED IN HOLDING THAT THE APPELLANT MAY NOT CLAIM THE PRIVILEGES OF THE FIFTH AMENDMENT IN RE-

FUSING TO PRODUCE THE BOOKS AND RECORDS SET FORTH IN THE SUMMONS.

The Memorandum Opinion of Judge Hall denied to Appellant the right to rely upon a privilege against self-incrimination under the Fifth Amendment. The records now sought were the records kept by a partnership of three persons. These records reflected the personal transactions and liabilities of each of the partners. While they were husband and wife, Appellant and E. J. Hubner made out joint tax returns on the basis of these records. (Tr. of Rec. p. 15 & 16). Appellant's personal liability on her tax returns is a reflection of the transactions of the Hubner Building Company from February 28, 1951. The records of the partners are the personal records of each of the co-partners, including E. J. Hubner.

This contention is in conformity with the case of *In Re Subpoena Duces Tecum, 81 Fed. Supp. 418.* In that case one of a number of co-partners was subpoenaed to produce the records of the co-partnership prospective to an anti-trust prosecution. The co-partners, not under subpoena, moved to quash under the Fourth and Fifth Amendments to the U. S. Constitution. The court held that the movants could not claim the privilege under the Fifth Amendment since they were not under compulsion to produce the evidence. The court did, however, hold that the papers were the private papers of the movants, and entitled to protection under the Fourth Amendment. The court said (81 Fed. Sup. 418 at page 421):

> "While the right is personal, it is not so limited that more than one person may not exercise it with respect to the same papers or effects. It is only when the group or association of persons is 'so impersonal in the scope of its membership and activities that it cannot . . . represent the purely private or personal interests of its constituents' that the right is unavailable."

If E. J. Hubner had been summoned to produce the papers in issue herein for examination as to his personal tax liability, he would have been in a position to claim the privilege against self-incrimination as to these, his personal papers.

His widow, Appellant herein, now asserts the same privilege for herself as to the same papers relating to her own individual tax liability for the same year on the same tax return to which she was also a signatory.

The only difference between the instant case and the foregoing hypothesis is that the Government is here purporting to be concerned only with the liability of the Borens. It is elementary, however, that the investigation need not be aimed at the witness for him to be entitled to the protection of the Fifth Amendment.

There remains then only an examination of the record to see whether they contain circumstances which suggest that the production of the papers would tend to incriminate Appellant.

Appellee in his brief in support of his petition for contempt, said:

> "In addition to the Affidavits of petitioner as aforesaid, the affidavit of Henry Miller has been filed, which shows that in the opinion of Miller and under the provisions of the Internal Revenue policies and procedures an indication of fraud was disclosed during the course of his examination of the transactions between the Borens and the Hubner Building Company." (Tr. of Rec. p. 36).

To support this recitation in his brief Appellee, as petitioner, filed an affidavit by Henry N. Miller, an Internal Revenue Agent who had been engaged in examining the books of the Borens. Miller stated:

> ". . . and in an effort to determine the accuracy of my audit, I checked certain of the Hubner Building Company books and records pertaining to the Borens. The records that I checked were the cash disbursement journal, cancelled checks, and supporting invoices reflecting payments from Hubner Building Company to the Borens. I thereafter compared these records with the records of the Borens and noted certain discrepancies. These discrepancies, when considered in light of other facts which were available, led me to believe that there were indications of fraud." (Tr. of Rec. p. 53 & 54)

The claimed discrepancy of the Borens is said to be in excess of $40,000. (Tr. of Rec. p. 36, 47, 48).

While this could reasonably be said to relate merely to possible fraud of the Borens, it is just as reasonable that both parties to whatever transac-

tion to which Henry Miller was alluding, were parties to an attempt to perpetuate such fraud.

If Hubner was a party to the concealing by the Borens of $40,000, it may well have been that he received an unreported consideration for his participation. If this consideration had been received during the period reported on his 1952 tax return, Mrs. Hubner would be liable on her signature on that same return. Having proved this, nothing would be left for the Government to do except by circumstantial evidence to prove knowledge on Appellant's part and thereby affix to her a criminal liability.

The claimed discrepancy of $40,000 may be viewed yet another way. The Government at the present moment assumes that the Borens received that $40,000 shown on the books of Hubner Building Company and failed to report the same. As logical an assumption would be that one of the partners of the Hubner Building Company made appropriate entries in his books showing payments in that amount to the Borens and pocketed $40,000 himself. If Hubner did not report such income, his wife could be criminally liable on the same hypothesis set forth above.

There are still other hypotheses which the trail court should have examined. Prior to their marriage Mrs. Hubner received a transfer of The Big Oak Ranch from Mr. Hubner. The affidavit of John L. McIver, filed in the trial court on behalf of Appellee, indicates that

"The records reflected that Hubner had expended close to $100,000 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration and, as such, respondent (Appellant herein) might be liable individually under existing regulations." (Tr. of Rec. p. 50).

In the state of the record, would it not be logical to assume that the peculiar circumstances of the transfer indicated that all or part of the value of the ranch was itself unreported income of E. J. Hubner. All that the Government would need prove was knowledge or assistance on the part of Appellant to hide the unreported income of E. J. Hubner.

In a normal situation the court will not presume any wrong-doing when it examines the logic of alternative hypothesis from a given set of facts. When, however, a witness has claimed the privilege not to testify because the testimony sought would tend to incriminate her, we do not believe the above presumption applies. If the judge of the trial court was not satisfied with the record as it stood on its pleadings and affidavits, he should have examined the questioned records *in camera* to satisfy himself that the records did or did not, in fact, tend to incriminate Appellant. No such opportunity was afforded the Appellant.

It is submitted that Appellant's basic, personal rights should not be whittled away with an edge of the Government's convenience. If the Borens are

guilty of fraud, the Appellee must find some means short of Appellant's self-incrimination to prove it.

Respectfully submitted,

Sloane & Fisher

Robert W. Conyers